

ISSUES RELATING TO POTENTIAL OVERLAP WITH THE DEPARTMENT
OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL HEALTH
AND SAFETY

I. PROPOSED REGULATIONS WITH POTENTIAL OVERLAP

A. Jurisdictional Overlap

At the time that the agenda item was written, five sections of the proposed regulations had been identified as having potential overlap with the jurisdiction of the Department of Industrial Relations, Division of Occupational Health and Safety (DOSH). Since that time, a number of additional sections have been identified which may require revisions to remove overlap. These sections are excerpted below.

This overlap must be removed for two reasons. First, any overlap would be in conflict with Public Resources Code section 43101(c) (1) which provides, in part, that: "... A clear and concise division of authority shall be maintained in both statute and regulation to remove all areas of overlap, duplication and conflict ... between the board and any other state agency..."

Second, an overlap could result in these standards being pre-empted by federal law. The U.S. Supreme Court has held that federal occupational safety and health standards preempt state standards, unless those state standards have been approved by the Secretary of Labor. Further, the court held that even if those state standards have a nonoccupational impact, they would be preempted if they also directly, substantially and specifically regulate occupational safety and health. (Gade v. National Solid Wastes Management Association (1992) 505 U.S. 88).

DOSH has provided suggestions regarding appropriate revisions to remove overlap. CIWMB staff would like to review these suggestions and seek input from affected parties, most notably LEAs, prior to recommending specific revisions in a formal comment period. Those portions of the regulations that may need revision are shown in italic. Those section without any italics have been identified as having the potential for overlap depending upon how they are implemented.

Section 17402.

Definitions.

(a) For the purposes of ~~this~~^{these} Articles: ...

(9) "High Noise Area" means an area within an operation or facility where noise levels are high enough to cause hearing loss to personnel or the public, as defined in Title 8, Group 15, Article 105, section 5096.

Section 17407.4.

Dust Control.

(a) The operator shall take adequate measures to minimize prevent the creation of dust and particulates, and the emission or accumulation of excessive dust, and prevent safety hazards caused by obscured visibility pursuant to Title 8, section 5155 (e)(1) and

(2). The operator should minimize the handling of wastes during processing to prevent the creation of excessive dust. Dust suppression methods, such as reduced processing, equipment such as misting systems or ventilation control shall be implemented/installed if dust levels are deemed excessive by the EA. Dust is excessive when it results in any of the following:

- (1) safety hazards due to obscured visibility; or
- (2) irritation of the eyes; or
- (3) hampered breathing.

(b) If this standard has been violated, the EA shall, in addition to any action to address the violations, also refer this matter to the Department of Industrial Relations, Division of Occupational Safety and Health.

Section 17408.34. Noise Control.

(a) Noise shall be controlled to ~~minimize~~ prevent health hazards to persons using the operation or facility and to prevent nuisance to nearby residents. High noise areas shall be: posted with warning signs that recommend or require hearing protection; separated by barriers that limit access to authorized personnel only; or, enclosed to reduce noise transmission, as required by the EA and other applicable agencies.

(b) If this standard has been violated, the EA shall, in addition to any action to address the violations, also refer this matter to the Department of Industrial Relations, Division of Occupational Safety and Health.

Section 17408.7. Personnel Health and Safety.

(a) Personnel shall wear and use appropriate safety equipment as described in ~~the required by the enforcement agency operator's Injury, Illness, and Prevention Program (IIPP) as required by appropriate requirements of Title 8 of the California Code of Regulations.~~ The IIPP shall be available for review by local and state inspectors during normal business hours.

(b) If this standard has been violated, the EA shall, in addition to any action to address the violations, also refer this matter to the Department of Industrial Relations, Division of Occupational Safety and Health.

Section 17409.2. Sanitary Facilities.

(a) ~~At a~~ Operations and facilities which have full time site attendant(s); shall have sanitary facilities consisting of an adequate number of ~~sanitary~~ toilets and hand washing facilities which shall be readily accessible to personnel, either on-site or in the immediate vicinity of the operation or facility.

(b) If this standard has been violated, the EA shall, in addition to any action to address the violations, also refer this matter to the Department of Industrial Relations, Division of Occupational Safety and Health.

Section 17410.3. Training.

(a) Personnel assigned to the operation or facility shall be adequately trained in subjects pertinent to site operations and maintenance, including the requirements of this Article, hazardous materials recognition and screening, with emphasis on safety, health, and environmental controls and emergency procedures including the requirements of this Article. A record of such training history shall be placed in the operating record.

(b) If this standard has been violated, the EA shall, in addition to any action to address the violations, also refer this matter to the Department of Industrial Relations, Division of Occupational Safety and Health.

Section 17415.2. Fire Fighting Equipment.

Facility personnel shall have fire suppression equipment continuously available in sufficient quantities, properly maintained and located as required by the local fire authority and EA.

Section 17416.1. Housekeeping.

Adequate housekeeping is required for the maintenance of all facility equipment. Accumulations of fuel drums, inoperable equipment, parts, tires, scrap, and similar items shall be minimized to reduce safety hazards.

Section 17416.2. Lighting.

When operations are to be conducted during hours of darkness, the facility and/or equipment shall be equipped with adequate lighting to ensure safety, and ability to monitor incoming loads and the effectiveness of operations.

Section 17416.3. Operational Equipment.

Operational equipment shall be adequate in type, capacity and number, and sufficiently maintained to allow the facility to meet all requirements of Articles 6.3 and 6.35 these standards.

Section 17418.2. Site Attendant.

A facility open to the public shall have an attendant present during public operating hours. The EA may approve periodic inspections by the operator if it will be sufficient to prevent health, safety, or fire problems.

Section 17418.3. Traffic Control.

Traffic flow through the facility shall be controlled to prevent the following:

(a) interference with or creation of a safety hazard to traffic on adjacent public streets or roads,

- (b) on-site safety hazards, and
- (c) interference with operations.

Section 17419.2.

Water Supply.

A safe and adequate water supply for drinking, and emergency use (i.e.: first aid) by facility personnel shall be available.

B. Mandatory Referrals

Five of the sections excerpted above contain provisions that would require LEAs to refer potential violations of DOSH requirements to that agency. During the comment period, LEAs expressed strong concerns about this requirement. They feel that it is inappropriate to include a referral as a mandatory requirement within a regulation because it would impose a serious obligation and liability upon them without the commensurate authority to enforce.

II. MEMORANDUM OF UNDERSTANDING

A. Background

A Memorandum of Understanding (MOU) has been proposed as a method for dealing with the potential overlap discussed above. CIWMB staff has had a preliminary discussion with DOSH regarding the general idea of an MOU and the range of options that have been discussed in the past. DOSH has indicated a willingness to discuss any of the options that have been raised. CIWMB staff has not had any discussions about the specific language of that MOU yet because the scope of that document has yet to be narrowed down.

Below is a brief discussion about the range of options for an MOU. It includes some analysis, a summary of input received from LEAs, so far, and recommendations on those options. CIWMB staff is seeking direction from the Committee prior to taking any additional steps to draft an MOU.

B. Options

Each of the options below is listed in order from least extensive to most:

1. No MOU

If the Committee directs staff to choose this option, the idea of an MOU would be abandoned. Several LEAs have indicated that they feel that an MOU is unnecessary as long as the regulations are written correctly to avoid overlap.

2. Explanatory MOU

This type of an MOU would simply set forth the understanding/agreement of the agencies that the regulations as written properly distinguish between the differing authority of the CIWMB/LEAs and DOSH. LEAs have indicated that this option would not necessarily be a problem, but caution that it should not be referenced in the regulations themselves and that they would reserve judgment till they saw the specific language of the document.

3. MOU with Procedure for Referrals

This option includes option 2, and would add a procedure for referrals to DOSH that could be used. LEAs have indicated that this option would not necessarily be a problem, but feel that any referral procedure should be informal and not mandatory (see discussion above). As with option 2, they would reserve judgment until they saw the specific language of the document.

4. MOU with Procedure for Resolving Jurisdictional Questions

This option includes option 3, and would add a procedure for resolving questions over jurisdiction as applied in any gray areas. Some LEAs do not support this option because they believe that the CIWMB should defer DOSH's expertise if it asserts jurisdiction. Other LEAs have indicated that this option would not necessarily be a problem, but would reserve judgment until they saw the specific language of the document.

5. MOU with Delegation for Inspection

This option includes option 4 and would add a delegation to CIWMB/LEAs to inspect on behalf of DOSH for specified standards. This option would also have to include training in the MOU. LEAs do not support this option. They feel that it gives them the responsibility to identify violations without providing them with the authority to resolve them. It may result in an "unfunded mandate" and would impose result in a stronger enforcement presence for the solid waste industry that that which exists for other industries. It would also require extensive training and changes in procedures. LEAs who wished to take on this additional responsibility could always enter into their own MOU with DOSH.

6. MOU with Delegation to Enforce

This option includes option 5 and would add a delegation to enforce DOSH standards as specified. This option would also have to include training in the MOU. LEAs do not support this option. They feel that it would significantly increase their role and responsibilities without justification. They also caution that it could interfere with enforcement of other standards by shifting resources to deal with DOSH standards. LEAs who wished to take on this additional responsibility could always enter into their own MOU with DOSH.

C. Staff Recommendation – Option 3

CIWMB staff recommend an MOU as described in option 3. Given the extreme difficulty of writing regulations to remove any potential for overlap, this option would be useful to prevent the possibility of preemption discussed above and to support the regulations. In addition, given the likely revisions to the standards, as discussed above, staff feel that an informal referral procedure would be useful because the new standards may result in a significant increase of those referrals. LEA comments regarding option 4 through 6 are well taken and staff would not recommend any of those options.